APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JULY TERM, 1971

No. 724-70

IN THE MATTER OF CHARLEY PAUL McCLAIN, Bankrupt,

FRED W. WOODSON, Trustee,
Appellant

v.

UTICA SQUARE NATIONAL BANK OF TULSA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 70-B-380)

Warren L. McConnico for Appellant.

William C. Anderson (Doerner, Stuart, Saunders, Daniel & Langenkamp on the brief) for Appellee.

Before BREITENSTEIN, McWILLIAMS and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this voluntary bankruptcy proceeding the question is whether the appellee Utica Square National Bank of Tulsa is a secured or an unsecured creditor. Over the objections of the trustee, the referee held that the bank was a secured creditor and the district court affirmed.

The bankrupt purchased a Chevrolet pickup truck from an automobile dealer in February, 1969, and executed a promissory note and a separate security agreement-financing statement. In that statement he warranted, by checking a

box thereon, that the pickup was to be used primarily "In Business." The dealer assigned the note and the purchase-money security interest to the bank for value. In reliance on the "In Business" designation the bank filed the security agreement in Oklahoma County, Oklahoma.

The bankruptcy proceedings were begun in April, 1970. The bank filed a proof of secured claim and the trustee objected thereto on the ground that the security agreement had not been filed in the proper county. The trustee contends that despite the "In Business" designation the pickup had always been used as consumer goods and that the security agreement had to be filed in Tulsa County, the county of the debtor's residence. The trustee offered evidence that the bankrupt never used the pickup for business purposes and, hence, his intent at the time of purchase was not to use it primarily for business purposes. The bank objected on the ground that parol evidence was inadmissible to vary the terms of the written security agreement. The referee sustained the objection and the district court affirmed.

Oklahoma has adopted the Uniform Commercial Code. See 12A O.S.A. An automobile comes within the term "goods" as there defined. See § 9-105 (1) (f) and Osborn v. First National Bank of Holdenville, Okl., 472 P.2d 440, 441-442. Goods are classified into four categories: consumer goods, equipment, farm products, and inventory. § 9-109. The classes are mutually exclusive, and the goods cannot be in two categories at the same time as to the same person. § 9-109, Comment 2.

The perfection of a security interest by filing requires the determination of the proper county in which to file. If the collateral is classified as consumer goods, the proper county in which to file is the county of the debtor's residence, in this case Tulsa County. § 9-401(a). If business equipment, the security agreement is to be filed with the county clerk of Oklahoma County. § 9-401(c). In the case

before us the bank filed in Oklahoma County.

The first problem is the rejection of the parol evidence offered by the trustee to sustain his claim that the pickup was in the class of consumer goods. The Bankruptcy Act allows the trustee to elect the status of an ideal lien creditor. See 11 U.S.C. § 110(c). As such he is in the position of a third-party lien creditor without notice. His priority is determined by the substantive law of the state where the property is located. Carroll v. Holliman, 10 Cir., 336 F.2d 425, 429. In Oklahoma an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. § 9-301(1)(b). We are unimpressed by the bank's reliance on B. F. Hoffman, Inc. v. Richardson, 3 Cir., 75 F.2d 823, which does not discuss the bankruptcy trustee's powers under 11 U.S.C. § 110(c).

The parol evidence rule applies only to the parties to the agreement in question. In re Assessments of Alleged Omitted Property, Okl., 58 P.2d 134, 137; see also Bardwell v. Commissioner of Internal Revenue, 10 Cor., 318 F.2d 786, 790, and Great Western Casualty Company v. Truck Insurance Exchange, 10 Cir., 358 F.2d 883, 885. The bank says that the parol evidence rule is not applicable because it is admittedly a holder in due course, and the note and security interest are subject only to defenses of a "real" nature. See e.g. § 3-305(2). The evidence sought to be introduced goes not to the note but to the security agreement. Cases holding that parol evidence cannot be introduced against one holding a negotiable instrument in due course are not strictly in point. Neither are decisions relating to the defense by a mortgagor against a holder in due course. In the case at bar we have a third party attacking the security interest.

A holder in due course of negotiable paper secured by collateral is in a different position when equities and defenses are asserted by the mortgagor and when third parties question the priority of the lien. Absent controlling statutes,

a holder in due course of negotiable paper secured by collateral has no better claim against the collateral than the mortgagor and may be affected by matters pertaining to constructive notice. See annotation in 127 ALR 190, 191-192. In our opinion the negotiation of a note secured by collateral cannot extinguish whatever claims a third party might have to the collateral. It follows that the bank is vulnerable to whatever claims or defenses a third party may assert against its assignor, the automobile dealer, and that the parol evidence rule does not preclude evidence pertaining to the primary use.

Finally, the bank argues that the warranty of use in the security agreement is conclusive. We believe that this is foreclosed by National Bank of Commerce v. First National Bank and Trust Company of Tulsa, Okl., 446 P.2d 277, a case involving priority of security interests as affected by the filing requirements of § 9-401. The court there said that the primary issue was "the classification of the (automobile) as equipment, consumer goods or inventory, to determine the proper place of filing." Ibid. at 280. In making the determination the court looked to extrinsic facts and did not give conclusive effect to the warranty in the security agreement. This expression of Oklahoma law is binding on us. The attempt of the bank to distinguish the National Bank of Commerce case on the ground that it was not concerned with the rights of a transferee-holder in due course is not persuasive. We have discussed the rights of a holder in due course when a claim is made by an ideal lien creditor such as the trustee.

The National Bank of Commerce decision comports with Comment 2 to § 9-109 which says that "the principal use to which the property is put should be considered determinative." Further, in bankruptcy situations involving the Uniform Commercial Code the courts have independently inquired into the classification and filing of collateral. Sequoia Machinery, Inc., v. Jarrett, 9 Cir., 410 F.2d 1116; see

also P. S. Products Corp. v. Equilease Corporation, 2 Cir., 435 F.2d 781. The difficult position in which the bank is placed results from Oklahoma law. The only answer would seem to be that a creditor in doubt about the proper classification of collateral should file in all possible counties where filing might be required.

Our decision herein is limited to (1) the evidence offered by the trustee should be received, and (2) the warranty of use in the security agreements is not conclusive. The question of proper classification is one to be determined in accordance with the usual bankruptcy procedures. Problems which may arise in connection therewith are not before us at this time.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN BANKRUPTCY
NO. 70-B-380

Filed August 27, 1970, William E. Rutledge, Referee in Bankruptcy, U.S. District Court, Northern District of Okla.

IN THE MATTER OF:
CHARLEY PAUL McCLAIN

ORDER

This matter came on for hearing before me the 20th day of May, 1970, and the 17th day of June, 1970, on the objection of Fred W. Woodson, Trustee ("Trustee"), to the allowance as a secured claim of Claim No. 3 filed herein by Utica Square National Bank of Tulsa ("Bank"), the collateral being one 1969 Chevrolet Fleetside Pickup Truck, Serial No. CE149J838971 (the "Pickup"); the Trustee appeared in person in open Court and by his attorney, Warren L. McGonnico, and the Bank appeared by its attorneys, Doerner, Stuart, Saunders, Daniel & Langenkamp, and William C. Anderson; whereupon, the Court proceeded to examine said Claim No. 3, and to hear the evidence presented in support thereof and in opposition thereto, and to hear the arguments of counsel and of the Trustee, and upon consideration thereof finds:

1. That the Bank and Trustee stipulated that the instruments and documents attached to said Claim No. 3 are true and correct copies of the executed originals in the possession of Bank.

2. That the nature of the Trustee's objection is that said Claim No. 3 should not be allowed as a secured claim, but instead as an unsecured claim only, for the reason that Bank did not file its Financing Statement and Security

Agreement covering the Pickup in the correct county, and therefore the Bank's security interest in the Pickup was not duly perfected; that said Financing Statement and Security Agreement was filed as and on non-consumer, business goods in Oklahoma County, whereas the Trustee contends it should have been filed as and on consumer goods in Tulsa County, the County of the Bankrupt's residence.

3. That said Financing Statement and Security Agreement, along with the Note thereby secured, were executed by the Bankrupt in connection with his purchase of the Pickup from Ramsey Chevrolet Co., Inc. on February 25, 1969; that said Note and Financing Statement and Security Agreement were duly assigned for value to Bank as a holder in due course on February 25, 1969; that Bank filed said Financing Statement and Security Agreement with the County Clerk of Okahoma County on March 3, 1969, under Document No. N005859.

4. That said Financing Statement and Security Agreement contains a series of three boxes which, when one of the three is checked, permit the debtor to give his warranty, covenant and agreement as to whether he intends to use the collateral primarily (1), "In business", (2) "For personal, family or household purposes", or (3) "In farming operations"; that on said Financing Statement and Security Agreement, the box designated "In business" is checked; that said Financing Statement and Security Agreement was so completed before it was assigned to Bank; that Bank relied exclusively on the "In business" designation in determining that the Financing Statement and Security Agreement should be filed in Oklahoma County; that Oklahoma County would be the proper county in which to file on collateral which the Bankrupt intended at the time of purchase to use primarily for business purposes (see 12A O.S.A. Secs. 9-401(1) and (3), and 9-109 (1)); and that neither before nor after the filing of said Financing Statement and Security Agreement did Bank receive any notice or obtain any knowledge

that the Bankrupt had not intended at the time of purchase to use the Pickup primarily for business purposes.

5. That the Bankrupt testified he could not remember whether the "In business" box on the Financing Statement and Security Agreement was checked before he signed that document; that Paul Savage, the Ramsey Chevrolet Co., Inc. salesman who handled this transaction, testified the "In business" box on the Financing Statement and Security Agreement was checked before the Bankrupt signed, and that in this transaction as well as all other transactions handled for Ramsey Chevrolet Co., Inc., he (Savage) uniformly followed the company's policy of fully completing all instruments before presenting them to the customer for signature.

6. That the Court finds it unnecessary to determine whether the "In business" box was checked prior to the affixing of the Bankrupt's signature, since even if it were not, the Bank as a holder in due course is entitled to enforce the instrument as completed, see 12A O.S.A. Sec. 3-407 (3); that therefore, under the rule prevailing in this District as set forth in Judge Barrow's Order of April 8, 1966, filed April 12, 1966, In the Matter of Thomas H. Lyons, Bankruptcy No. 65-1037, U.S.D.C., N.D. Okl., the Court finds that Claim No. 3 of Bank should be allowed as a secured claim and the objection of the Trustee overruled; that the Bank was entitled to rely on the "In business" designation appearing on the Financing Statement and Security Agreement, and properly perfected its security interest in the Pickup as and on business equipment by filing said document in Oklahoma County.

7. That certain testimony was offered by the Trustee as tending to show that the Bankrupt did not in fact ever use the Pickup for business purposes, the inference being that the Bankrupt's intent at time of purchase was not to use the Pickup primarily for business purposes; that the Bank objected to the admissability of such evidence on the ground it was parol testimony offered to vary the terms of

the written Financing Statement and Security Agreement; that the Court reserved ruling on the Bank's objection, and permitted said testimony to be presented; that the Court now finds that such testimony is inadmissable for the reasons stated by the Bank, and the Bank's objection thereto is sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Claim No. 3 of Utica Square National Bank of Tulsa be and the same is hereby sustained as a secured claim, and the objection of the Trustee thereto is overruled.

So ordered this 27th day of August, 1970.

/s/ William E. Rutledge
REFEREE IN BANKRUPTCY

APPROVED AS TO FORM:

/s/ William C. Anderson
WILLIAM C. ANDERSON of Doerner, Stuart, Saunders, Daniel & Langenkamp, Attorneys for Utica Square National Bank of Tulsa Claimant

/s/ Warren L. McConnico
WARREN L. McCONNICO, Attorney for Fred W. Woodson, Trustee

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Bankruptcy
No. 70-B-380

Filed October 1, 1970, John H. Poe, Clerk, U. S. District Court.

IN THE MATTER OF
CHARLEY PAUL McCLAIN, Bankrupt.

ORDER SUSTAINING THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has for consideration the Referee's Certificate of Review, the Petition for Review filed by the Trustee in Bankruptcy, the Findings of Fact and Conclusions of Law of the Referee and the exhibits, and, being fully advised in the premises, finds:

That there is substantial evidence to sustain the Findings of Fact of the Referee and ample law to sustain the Conclusions of Law, and such Findings of Fact and Conclusions of Law are not clearly erroneous and must be upheld.

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law be and the same are hereby affirmed and adopted by this Court.

ENTERED this 30th day of September, 1970.

/s/ Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPENDIX D

Title 11 U.S.C., Section 96(a) (1):

"A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Title 11 U.S.C., Section 96(a) (2):

"For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of the petition."

Title 11 U.S.C., Section 96(a) (7):

"Any provision in this subdivision (a) to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a

new and contemporaneous consideration to be perfected by recording, delivery or otherwise, in order that no lien described in paragraph (2) of this subdivision could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer;

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I of this paragraph, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this title, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition."

Title 11 U.S.C., Section 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has re-

ceived or converted such property except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Title 11 U.S.C., Section 110(a):

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . ."

Title 11 U.S.C., Section 110(c):

"The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, rem-

edies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Title 12A O.S.A. Section 9-109:

"Goods are

(1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes;

(2) 'equipment' if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) 'farm products' if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) 'inventory' if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment."

Title 12A O.S.A., Section 9-301(2):

"If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing."

Title 12A O.S.A., Section 9-301(3):

"A 'lien creditor' means a creditor who has acquired

a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interests such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest."

Title 12A O.S.A., Section 9-303(2):

"If a security interest is originally perfected in any way permitted under this Article and is subsequently perfected in some other way under this Article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Article."

Title 12A O.S.A., Section 9-312(4):

"A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter."

Title 12A O.S.A., Section 9-401(1):

"(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, contract rights or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the county clerk in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the county clerk in the county where the goods are kept, and in addition

when the collateral is crops in the office of the county clerk in the county where the land on which the crops are growing or to be grown is located;

(b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the county clerk of Oklahoma County."

Title 12A O.S.A., Section 9-401(3):

"A filing which is made in the proper county continues effective for four months after a change to another county of the debtor's residence or place of business or the location of the collateral, whichever controlled the original filing. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new county within said period. The security interest may also be perfected in the new county after the expiration of the four month period; in such case perfection dates from the time of perfection in the new county. A change in the use of the collateral does not impair the effectiveness of the original filing."

Title 12A O.S.A., Section 9-405(1):

"A financing statement may disclose an assignment of a security interest in the collateral described in the statement by indication in the statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. Either the original secured party or the assignee may sign this statement as the secured party. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in Section 9-403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be fifty cents ($0.50)."